ORIGINAL

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M FIGEL

HENK BRANDS
SEAN A. LEV
EVAN T. LEO
ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

March 9, 2001

Ex Parte Presentation

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Right to Exclude Multi-Functional Equipment from a CLEC's Collocation Space, Second Further NPRM in CC Docket No. 98-147 and Fifth Further NPRM in CC Docket No. 96-98***

Dear Ms. Salas:

This letter responds to AT&T's Ex Parte Letter of February 21, 2001, which erroneously claims (at page 3) that the nondiscrimination provision of 47 U.S.C. § 251(c)(6) permits a CLEC to collocate equipment with unnecessary functions "if the incumbent makes use of 'necessary' functions anywhere within its own network by integrating them with 'non-necessary' functions."

This absurd, bootstrap argument does not advance AT&T's case in the least. The "meaning of statutory language . . . depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (internal quotation marks omitted). And "the Commission must operate within the limits of 'the ordinary and fair meaning of [the statute's] terms.'" *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 424 (D.C. Cir. 2000) (alteration in original) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999)). The nondiscrimination requirement of section 251(c)(6) simply cannot be used to expand the meaning of the referent by which it is contextually limited: "equipment *necessary* for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6) (emphasis added); *see O'Connor v. United States*, 479 U.S. 27, 31 (1986) (statutory context showed that unmodified phrase "any taxes" included only taxes of Republic of Panama); *cf. Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714, 720 (D.C. Cir. 1991) ("To say that every discriminatory municipal policy is prohibited by the Fair Housing Act would be to expand that Act to a civil rights statute of general applicability rather than one dealing with the specific problems of fair housing opportunities.") (internal quotation marks omitted).

Contrary to the unstated premise of AT&T's argument, ILECs are not *collocating*. They are placing their own property on their own premises. And the D.C. Circuit resoundingly rejected the argument that the collocation statute is an equal access provision. AT&T's argument thus cannot be squared with the court's holding, stated in the plainest possible terms, that section 251(c)(6) "requires LECs to provide physical collocation of equipment as 'necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier,' *and nothing more*." *GTE*, 205 F.3d at 423 (emphasis added) (quoting 47 U.S.C. § 251(c)(6)). The court decidedly rejected any interpretation of the statute requiring collocation of equipment that "unnecessarily '*includes a switching functionality, provides enhanced service capabilities, or offers other functionalities.*'" *Id.* at 424 (quoting *Collocation Order* ¶ 28). And it did so in the face of AT&T's argument, essentially identical to the assertions it makes here, that it should be allowed to smuggle such *unnecessary* functions into its collocation space in the central office so long as they are integrated in equipment that also performs at least one *necessary* function. *See GTE*, Joint Brief of Intervenors in Support of Respondents at 12 (D.C. Cir. filed Nov. 29, 1999) ("Joint Brief") (advocating collocation of "equipment that can be used for interconnection or access to UNEs as well as for other uses (like switching or advanced services)").*

If the Commission were to accept AT&T's strained argument here, the result would flatly contradict the D.C. Circuit's mandate in *GTE*. *See Iowa Utils. Bd. v. FCC*, 135 F.3d 535 (8th Cir. 1998) (issuing mandamus where FCC attempted indirectly to enforce pricing regulations vacated as beyond the Commission's jurisdiction under the 1996 Act), *vacated on other grounds*, 525 U.S. 1133 (1999); *MCI Telecomms. Corp. v. FCC*, 580 F.2d 590, 597 (D.C. Cir. 1978) (ordering compliance with the court's mandate where subsequent FCC order was "clearly inconsistent with the basic themes of our [prior] decision" and "frustrates [its] intended effect").

This is not the first time AT&T has attempted to override the statute's plain language limiting forced collocation to equipment necessary for one of the two specified functions. In its attempt to support a collocator's right to cross-connect with other collocators, AT&T argued in the *GTE* appeal, just as it argues here, that "carrier-provided cross-connects are a reasonable and nondiscriminatory 'term and condition' of collocation." *See* Joint Brief at 13 (quoting 47 U.S.C.

---

* AT&T repeats its meritless claim that packet switching should be collocated because it performs more than mere switching functions and thereby serves "efficiency in the use of facilities." AT&T Ex Parte Letter at 3; *compare* Comments of AT&T at 29-30, CC Docket No. 98-147 (FCC filed Oct. 12, 2000). This is no different from saying that a circuit switch makes for efficient use of facilities. As SBC has pointed out, however, "the D.C. Circuit made quite clear that efficiency concerns do not trump the 1996 Act's plain meaning." Reply Comments of SBC Communications Inc. at 14, CC Docket No. 98-147 (FCC filed Nov. 14, 2000).

§ 251(c)(6)); *see also id.* at 14. The court rejected the argument, holding that the collocation of such cross-connects had no basis in the statute precisely because they are not "in any sense 'necessary for interconnection or access to unbundled network elements.'" *GTE*, 205 F.3d at 423. And the court also rejected the premise, which AT&T recycles here, that an ILEC may use the incumbent's property in the same way the incumbent does. *See GTE* Tr. at 32 ("THE COURT: That's a really extraordinary notion if the incumbent then is efficient, has found some good ways to run its operation on its own premises, and the competitor can figure out what they are, the competitor ought to be able to do the same thing on the incumbent's premises too. That doesn't make — that can't be what the statute means."); *compare* Joint Brief at 11 (arguing that collocators should be able to "take advantage of the efficiencies of integrated equipment").

AT&T refers to similar nondiscrimination provisions such as that found in nearby section 251(c)(3) (access to unbundled network elements). But that section simply underscores the fact that a nondiscrimination requirement cannot be used to expand the scope of the category within which it operates. Since the incumbent obviously has access to all of its own network elements, AT&T's theory would require that CLECs also have complete access to all ILEC UNEs — whether or not such access is "necessary" as interpreted by the Supreme Court. *See Iowa Utils. Bd.*, 525 U.S. at 390 (rejecting the Commission's interpretation under section 251(c)(3) and (d)(2) "that whatever requested element can be provided must be provided"). Neither section 251(c)(3) nor section 251(c)(6) permits a CLEC to access the incumbent's network or to occupy the incumbent's property in the same scope and manner that the incumbent does; rather, such access or occupation must be *necessary* for the limited purposes authorized by the statute. AT&T's suggestion that a nondiscrimination provision can authorize a further — indeed, expansive — taking patently contravenes the controlling principle that such a taking must have a "clear warrant" in the authorizing statute. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994); *see also GTE*, 205 F.3d at 419 (FCC taking must be "explicitly authorized" by Congress).

Based on these principles, the D.C. Circuit held that the required collocation of equipment that contains functions that are not necessary for interconnection or access to UNEs "impermissibly invites unwarranted intrusion upon LECs' property rights"* and is "overly broad

---

* Notably, AT&T concedes that "Congress defined the scope of the authorized taking through the substantive terms of the statute, not by reference to the volume of space occupied." AT&T Ex Parte Letter at 5. Thus, as SBC explained in its Ex Parte Letter of February 1, 2001, equipment containing functions not necessary to accomplish the only two congressionally authorized purposes may not be collocated regardless of whether it occupies any additional space.

and disconnected from the statutory purpose enunciated in § 251(c)(6)." *GTE*, 205 F.3d at 422. The FCC's attempt to require collocation of multi-functional equipment (as well as cross-connects) thus amounted to "unbridled agency action." *Id.* at 424. So too would the bootstrap approach that AT&T again promotes on remand.

Pursuant to the Commission's rules governing ex parte communications, I am enclosing four copies of this letter. Please file stamp and return the additional copy. Thank you very much.

Respectfully submitted,

Michael K. Kellogg

cc: Brent Olson
William A. Kehoe
International Transcription Services, Inc.